in the

Supreme Court

of the

United States

OCTOBER TERM 1977

NO. 77-1626

ROBERT HIGGINS and
WILLIAM J. MILLER,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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SUBJECT INDEX

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The Petitioners, Robert Higgins and William J. Miller, respectfully pray that a Writ of Certiorari issue to review the Opinion and Judgment of the United States Court of Appeals for the Fifth Circuit, entered in

the above-styled cause on February 21, 1978, Petition for Rehearing and Petition for Rehearing en banc denied on April 14, 1978.

OPINION BELOW

The Opinion of the Court of Appeals appears in Appendix "A" hereto.

JURISDICTION

The Judgment of the Court of Appeals for the Fifth Circuit was entered on February 21, 1978 affirming the Petitioners' convictions. The Fifth Circuit Judgment as to Petitioners Higgins and Miller in Fifth Circuit Case No. 77-5194 set forth in Appendix "E" hereto; the Fifth Circuit Judgment as to Petitioner Higgins in Fifth Circuit Case No. 77-5321 is set forth as Appendix "F". This Court's jurisdiction is invoked under 28 *United States Code* §1254(1).

QUESTIONS PRESENTED

Whether the Defendants were denied due process of law guaranteed by the Fifth Amendment when the Trial Court failed to grant the Defendants' Motion to Dismiss the Indictment due to Unnecessary and Unexcused Pre-Indictment Delay where the delay was not due to any ongoing investigation and where the Government did not offer any excuse or justification for the delay where the delay was in excess of four years between the commission of the alleged offense and the return of the Indictments herein.

Whether the District Court erred in denying Defendant's Motion for Bill of Particulars with respect to specific dates, as a result of which the Defendants' defense of Alibi was rendered demonstrably meaningless despite the fatal variance between the Indictment and proof at trial with respect to the time period alleged in the Indictment, as a result of which the Defendant Higgins was denied due process of law contrary to the Fifth Amendment to the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The case *sub judice* involves the Petitioners' right to due process of law guaranteed by the Fifth Amendment to the United States Constitution which appears as Appendix "H" attached hereto.

PRELIMINARY STATEMENT

The facts with respect to unnecessary and unexcused pre-indictment delay apply to both cases for which certiorari is sought.

In the first case, pre-indictment delay is the sole issue before this Court; hence, the specific facts of that case are not relevant to this Court's consideration of the Petition for Writ of Certiorari.

In the second case *where Petitioner Miller has not been indicted,* Petitioner Higgins raises a second issue; hence, the specific facts of that case are germane to this Petition for Writ of Certiorari and are set out in the Statement of the Case which follows.

STATEMENT OF THE CASE

Facts as to Fifth Circuit Case No. 77-5194
U.S. District Court Case No. 76-377-Cr-WM:

Petitioners Higgins and Miller were indicted in August, 1976 and charged with one count of conspiracy to import marijuana in March, 1972, contrary to 21 U.S.C. §963. In order to relate, meaningfully, those facts which bear on the pre-indictment delay in this case, Petitioners have prepared a chart detailing those facts for this Court's utilization in analyzing the delay. The bases for all factual statements are found in this chart which is set forth as Appendix "I".

On March 5, 1972, Bernard Baston and Peter Hoyer were arrested in Baltimore, Maryland, and ultimately charged in the United States District Court for the District of Maryland with possession and distribution of marijuana. This is the incident to which the Petitioners have been linked in the present conspiracy indictment returned four years and five months later in August, 1976. At the time of their arrest, Hoyer and Baston gave statements to agents of the Bureau of Narcotics and Dangerous Drugs (B.N.D.D.), the predecessor agency of the Drug Enforcement Administration, hereinafter referred to as "D.E.A.", implicating Johhn Licktieg and Richard Thurlow, who later become the Government's chief witnesses against the Petitioners. Also implicated was Thomas Swan, a co-defendant of the Petitioners at trial.

During and prior to March, 1972 and as early as November, 1971, the United States Customs Service had been investigating the vessel "Alisan" and the ac-

tivities of the Petitioner Higgins as Captain of that boat. In June, 1972, United States Customs closed its file on the Petitioners and the boat "Alisan".

In May, 1973, Thurlow gave a lengthy statement to a D.E.A. agent inculpating Petitioner Higgins in the activities alleged in the Indictment. The D.E.A. pursued no additional investigative activity until February 1, 1974, when a D.E.A. agent attended an inter-agency meeting consisting of United States Customs, United States Coast Guard, D.E.A., Dade County Public Safety Department and the City of Miami Beach Police Department, at which time the alleged smuggling activities of the Petitioners Higgins and Miller were discussed, along with those of Robert West and Kenny Randall. During February, 1974, a "cross-reference" file was compiled on the Petitioners. Except for a second interview with Thurlow in July, 1974, the D.E.A. conducted no further investigative activities and the Miami office of D.E.A. again "closed" its files on Petitioners in October, 1975. One month later, in November, 1975, the D.E.A. "Conspiracy Unit" began an investigation of the Petitioners based on information supplied by the Dade County Public Safety Department.

In the meantime, in February, 1974, the Dade County Public Safety Department had arrested the Petitioners for possession with intent to distribute 1,500 lbs. of marijuana. Information regarding Petitioners' arrests was sent to the Miami office of the D.E.A. The charges were ultimately dismissed by the 11th Judicial Circuit Court in and for Dade County, Florida.

In October, 1975, Petitioner Higgins was arrested by Bahamian officials in the Bahamas and charged with

possession of marijuana. Both the D.E.A. and the Dade County Public Safety Department were notified of this arrest. The Bahamian charges were ultimately dismissed. Little, if any, significant investigative activity followed the October, 1975 arrest of Petitioner Higgins before the Indictments in this case and in the related Fifth Circuit Case No. 77-5321 (U.S. District Court Case No. 76-343-Cr-CA) were returned.*

After a trial by jury at which the Petitioners were found "Guilty", the District Court sentenced the Petitioner Higgins to a term of one year's imprisonment to be followed by a two-year special parole term. Petitioner Miller was sentenced to six months' incarceration, followed by three years' probation.

Facts as to Fifth Circuit Case No. 77-5321
U.S. District Court Case No. 76-343-Cr-CA:

On July 29, 1976, the Petitioner Higgins was indicted and charged with one count of Conspiracy to Possess with intent to Distribute Marijuana in November and December, 1971, contrary to 21 U.S.C. §846. The Indictment alleged, in part, that on or about November 5, 1971, the motor vessel "Alisan" departed Miami and returned on or about November 15, 1971, bearing the Petitioner as a passenger.

As indicated in the Preliminary Statement and in the previous Statement of Facts in Fifth Circuit Case

*The decision to seek an indictment in Federal, rather than State, Court was made by the Dade County Public Safety Department because of statutes of limitation considerations and the fact that state law enforcement officers felt it was "easier" to obtain a conspiracy conviction in Federal rather than State, Court.

No. 77-5194, Petitioner Higgins and the vessel "Alisan" were being investigated by federal authorities for suspected marijuana smuggling activities. As indicated in Petitioners' Time/Fact Sequence Chart, Appendix "I", between November, 1971 and July and August, 1976, three potential defense witnesses died, one of whom was Higgins' roommate between November, 1971 and March, 1972, thus denying Petitioner Higgins possible defense witnesses supporting his defense of Alibi in this case.

On September 14, 1976, the Petitioner's Motion for Bill of Particulars (Appendix "C") was denied with respect to whether the dates in the Indictment were the exact dates on which the Government had alleged the event in question to have occurred (Appendix "D").

At the Petitioner's non-jury trial, the Government presented the following testimony. Richard Thurlow, who identified the time period of the smuggling venture on the vessel "Alisan" as being between November 1-17, 1971, during which time frame the roundtrip from Miami to Jamaica and back took ten days. There was no testimony by Thurlow of anything unusual about Petitioner's appearance or health.

Glenda Walters was the Government's next witness during its case in chief. Again, Ms. Walters did not testify as to anything unusual about Petitioner's physical condition or appearance during the ocean-going voyage. Ms. Walters testified at length concerning the Petitioner's adroit physical activities on the "Alisan" while it was on the high seas which included lifting a 200-lb. trash compactor.

By agreement with the Government, Petitioner was permitted to call Dr. Robert J. Slutsky, an orthopedic surgeon, out of turn, who testified on behalf of the Petitioner that he had placed a knee-to-toe cast on the Petitioner on October 29, 1971. The cast was a *pink* soft plastic cast. Doctor Slutsky testified that he replaced the cast on November 9, 1971 and saw the Petitioner Higgins on November 10, 16 and 19 and December 3, 1971.

After the Government rested and Petitioner's Motion for Judgment of Acquittal was denied, Petitioner called, in addition to Dr. Slutsky, Dr. Charles Mutter, a prominent forensic psychiatrist, whose testimony went to the suggestibility and believability of Ms. Walters. In addition, Petitioner introduced the psychiatric records of both Thurlow and Ms. Walters. Following this, Petitioner rested.

Ms. Walters, called back to the witness stand by the Government, testified in rebuttal that she suddenly recalled that Petitioner Higgins had a *white* cast on his leg during the boat trip (which, if true, could only have been between November 19 and December 3, 1971, according to Dr. Slutsky's testimony and, thus, outside the time frame of the Indictment).

After the Government rested with this rebuttal testimony, Petitioner renewed his Motion for Judgment of Acquittal which was denied. The District Court found Higgins guilty of conspiracy to import marijuana in violation of 21 U.S.C. §846. The Court sentenced Petitioner to six months' imprisonment, to be followed by two years' parole. This sentence was consecutive to

the sentence imposed in Fifth Circuit Case No. 77-5194, United States District Court Case No. 76-377-Cr-WM.

Both cases were appealed to the Fifth Circuit Court of Appeals and consolidated for the purpose of oral argument. The Fifth Circuit affirmed Petitioners' convictions, holding that Petitioners Higgins and Miller had not crossed the threshold of establishing actual prejudice resulting from pre-indictment delay and, further, that Petitioner Higgins' other arguments were "without merit".

REASONS FOR GRANTING THE WRIT

[PRE-INDICTMENT DELAY (BOTH CASES)]

There exists a conflict between the Fifth and Eighth Circuit Courts of Appeal as to whether a Defendant has the burden of proving actual prejudice resulting from pre-indictment delay or whether the burden shifts to the Government to prove non-prejudice after a Defendant has set out a potentially-demonstrable claim of prejudice. In affirming the Petitioners' convictions, the Fifth Circuit held that it was inferable from its prior decisions that "Defendants generally bear the burden of establishing actual prejudice."

Placing the ultimate burden of establishing actual prejudice on the Defendant often places an insurmountable barrier to the Defendant's presentation of a claim of pre-indictment delay which violates due process of law, contrary to the Fifth Amendment. That Defendant may not have had the benefit of years of preparation as the Government has. Often, a defendant is unable to speak to witnesses until after their memory has diminished or completely faded. This is especially true where the defendant has not been indicted until years after the incident in question. Potentially exculpatory witnesses may move from the community before a defendant has had an opportunity to secure their cooperation, testimony and/or statements. A defendant may never know what knowledge a witness possessed where the witness has died prior to the filing of an Indictment, an act, the timing of which the accused has no control over.

A defendant's inability to answer the above questions results in his claim of prejudice being labelled "speculative" and "insufficient". However, the Government may well be in possession of information from, or about, the missing or deceased witness, which may be of benefit to the accused in establishing his claim, and which, in limited circumstances, the Government may have a duty to reveal. *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194 (1963); A.B.A. Code of Professional Responsibility D.R. 7-103 (B).

The Eighth Circuit in *United States v. Barket,* 530 F. 2d 189 (8th Cir. 1975) *cert. den.* 429 U.S. 917, 97 S.Ct. 308 (1976), on a claim of prejudice resulting from deceased witnesses and witnesses with faded memories has shifted to the Government the burden of establishing that the missing or deceased witnesses and those with faded recollections did not possess exculpatory information. See, also, *United States v. Norton,* 504 F.2d 342 (8th Cir. 1974) *cert. den.* 419 U.S. 1113, 95 S.Ct. 790 (1970).

The lead case on pre-indictment delay absent an arrest is, of course, *U.S. v. Marion,* 404 U.S. 307, 92 S.Ct. 455 (1971). Since the decision in *Marion,* the Fifth as well as other Circuits, have had ample opportunity to consider the extent to which a defendant's claim of a denial of due process should be expanded. This Court's most recent interpretation of *Marion* is found in *U.S. v. Lovasco,* 431 U.S. 738, 97 S.Ct. 2044 (1977). In *Lovasco, supra,* this Court held that *pre-indictment delay which was part of a continuing investigation* did not deprive a defendant of due process of law even if his defense may have been prejudiced by the pre-indictment delay. Alternatively, it seems clear that where the pre-

indictment delay is not part of a continuing investigation, no such justification, as in *Lovasco,* exists for the delay and, hence, the burden ought to shift to the Government to show non-prejudice.

Prejudice, under the Fifth Circuit Rule, is a threshold question that must be satisfied before the defendant can present evidence on the reasons for the delay. The Fifth Circuit Rule of requiring a defendant to bear the burden of proving actual prejudice is a rule of mechanistic application which ignores the realities of the criminal justice system. It is the Government which brings about the act of investigation and the ultimate act of indictment and arrest. It is far better that consideration be given to the reasons for the delay and whether the Government possessed, or is likely to possess, the necessary information to proceed with the prosecution.

The Eighth Circuit Rule of shifting the burden to the Government in appropriate cases is a much more flexible, realistic and workable rule. That Circuit's rule recognizes that several factors should be considered in determining who has the burden of proof on the issue of prejudice. Implicit in the Eighth Circuit's view is that when the period of delay is great, as here, over four years, then the burden shifts to the Government after a defendant has articulated a tenable claim of prejudice.

Cases involving pre-indictment delay may be divided into two categories. The first is where delay has averaged approximately eighteen months and there has been investigative delay. This is the most common case and relief is barred by *Lovasco, supra.* The second category involves a much greater period of delay, i.e., an

average of forty-eight months. That delay is usually not as a result of an on-going or continuing investigation. This is the category into which *Barket, supra,* and Petitioners' cases fall.

Petitioners contend that the appropriate standard for imposing the ultimate burden of proof on the issue of prejudice should be the Eighth Circuit's Rule. Consideration should be given to the length of the delay, the availability of information to the defendant, the reason for the delay, and the likelihood that the Government possesses information on these issues, or at least is in a better position to determine same. Any other standard renders the time-honored adage "Justice delayed is justice denied" meaningless.

STATEMENT OF PARTICULARS

As to Fifth Circuit Case No. 77-5321,
U.S. District Court Case No. 76-343-Cr-CA:

The rule in the Fifth Circuit concerning the purposes of a Bill of Particulars is "to inform the defendant of the *nature* of the charge against him *with sufficient precision to enable him to prepare his defense,* and to avoid or minimize the danger of surprise at trial." *United States v. Martinez,* 466 F.2d 679 (5th Cir. 1972) [emphasis added]; *United States v. Bearden,* 423 F.2d 805 (5th Cir. 1970), *cert. den.* 400 U.S. 836, 91 S.Ct. 73 (1970). While the Government need only prove the commission of an offense within the period of the Statute of Limitations, an implicit purpose of a bill of particulars is to specify a particular date as near as possible to the commission of the offense so as to enable or allow the defendant to prepare his defense, if any, to the charge. In appropriate cases, as here, the Defendant's defense may include the defense of Alibi.

Sub judice, the Defendant contended that he could not have been on the vessel during the time period in question engaging in the acts alleged in the Indictment as testified to by the Government's witnesses because during that time period, he was being seen in Miami by Dr. Slutsky and, in addition, had a cumbersome cast on his leg. By denying the Defendant's Motion for Bill of Particulars, the Government was able to prove up its case within any time period, thus vitiating the Defendant's alibi defense.

In some cases, the Government may not be able to specify or narrow the dates as precisely as requested by

the Defendant. But, it is the Government's responsibility to object to, or answer, the Defendant's Motion by stating that it is unable to specify the dates. *Sub judice,* that was not the case as consistent with the allegations in the Indictment, one of the Government's witnesses, Thurlow, testified to a time period of between November 1 and November 17, 1971, as being the time during which the alleged sea-going smuggling venture occurred. The District Court ought not deny a defendant's request for particulars on the ground that the Government is unable to supply the requested information where the Government has not stated that it is unable to do so. A denial under these circumstances is an abuse of discretion, the effect of which was to obviate any meaningful alibi defense available to the Defendant.

The Fifth Circuit has departed from its own precedent in refusing to review the lower court's abuse of discretion. During argument on Defendant's Motion for Judgment of Acquittal, Defendant pointed out that the Government's testimony as to dates was inconsistent with Defendant's defensive alibi, i.e., Defendant had a cast on his leg between October 29, 1971 and November 19, 1971 — almost the exact time period the Government alleged and proved the marijuana and smuggling trip took place on the high seas (November 1 — November 17, 1971). The Trial Court's answer was that the Government was not required to prove the dates with particularity (because Defendant's Motion for a Bill of Particulars as to the time frame had been denied). See, Appendix "C" and "D". Thus, the Trial Court's arbitrary denial of Petitioner's Motion for Bill of Particulars (which was unopposed by the Government) as to a specific date has resulted in a denial of due process

of law and a fair and impartial trial guaranteed by the Fifth and Sixth Amendments to the United States Constitution where, as here, the defense of Alibi was claimed and proved. The only time the Defendant could have, consistent with Dr. Slutsky's testimony, been engaged in the venture described was between November 19 and December 3, 1971 when Dr. Slutsky testified he did not see Petitioner Higgins. Had the Motion for Bill of Particulars been granted, the Government would have been limited in its presentation of evidence consistent with the allegations in the Indictment. Any other proof of trial would have been inconsistent with the Indictment, the correct remedy for which would have been the granting of the Defendant's Motion for Judgment of Acquittal.

CONCLUSION

Based upon the above and foregoing arguments, Petitioners Higgins and Miller request this Honorable Court to grant the Petition for Writ of Certiorari and thereafter reverse their respective Judgments and Sentences in Fifth Circuit Case No. 77-5194 (U.S. District Court Case No. 76-377-Cr-WM); Petitioner Higgins further requests this Court to grant his Petition for Writ of Certiorari and thereafter reverse his Judgment and Sentence in Fifth Circuit Case No. 77-5321 (U.S. District Court Case No. 76-343-Cr-CA).

Respectfully submitted,

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By: _____
JOEL HIRSCHHORN

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of the foregoing Petition for Writ of Certiorari to the United States Court of Appeal for the Fifth Circuit were mailed to THE SOLICITOR GENERAL OF THE UNITED STATES, Department of Justice Building, Room 5614, Washington, D.C. 20530, and copies were also mailed to THE OFFICE OF THE U.S. ATTORNEY, 300 Ainsley Building, Miami, Florida 33132 and to the CLERK, U.S. COURT OF APPEALS FOR THE FIFTH CIRCUIT, 600 Camp Street, Room 102, U.S. Courthouse, New Orleans, Louisiana 70130, this _____ day of May, 1978.

_____
JOEL HIRSCHHORN

Appendix

INDEX TO APPENDICES

UNITED STATES of America,
Plaintiff-Appellee,

v.

Robert WEST, Kenny Randall, Robert Higgins, William Miller and Thomas Swan,
Defendants-Appellants.

UNITED STATES of America,
Plaintiff-Appellee,

v.

Robert HIGGINS and Thomas Swan,
Defendants-Appellants.

Nos. 77-5194 and 77-5321.

United States Court of Appeals,
Fifth Circuit.

Feb. 21, 1978.

Defendants convicted in the United States District Court for the Southern District of Florida at Miami, William O. Mehrtens, J., appealed. The Court of Appeals, Alvin B. Rubin, Circuit Judge, held that: (1) where defendants showed no prejudice from preindictment delay and no violation of constitutional right to due process other than mere delay in indictment, they were not entitled to reversal of their convictions and dis-

missal of charges against them, and (2) where an issue under the Interstate Agreement on Detainers, as affecting one defendant, was the same as an issue before the United States Supreme Court in other case decision of the case before the Court of Appeals would not be delayed pending action by the Supreme Court, but appeal of the one defendant would be severed and the decision in it would abide the result in the case before the Supreme Court.

Judgments affirmed except appeal of one defendant in case No. 77-5194.

1. Constitutional Law — 265

Court, in evaluating asserted due process violation based on preindictment delay, must consider both reasons for delay and prejudice to accused, but in identifying violation, prejudice to accused is the threshold criterion.

2. Criminal Law — 576(11)

Defendants generally bear burden of establishing actual prejudice from preindictment delay.

3. Criminal Law — 1166(1)

Where defendants showed no prejudice from preindictment delay and no violation of constitutional right to due process other than mere delay in indictment, they were not entitled to reversal of their convictions and dismissal of charges against them.

4. Criminal Law — 1181

Where issue under Interstate Agreement on Detainers, as affecting one defendant on appeal to Court of Appeals, was before United States Supreme Court in another case, decision of case before Court of Appeals would not be delayed pending action by Supreme Court, but appeal of the one defendant would be severed and decision in it would abide result in case before Supreme Court. Interstate Agreement on Detainers Act §§ 1 et seq., 2, art. IV(c), 18 U.S.C.A. App.

Appeals from the United States District Court for the Southern District of Florida.

Before COLEMAN, HILL, and RUBIN, Circuit Judges.

ALVIN B. RUBIN, Circuit Judge:

The defendants in these two criminal cases, as so many others have done since the decision in *United States v. Marion*, 1971, 404 U.S. 307, 92 S.Ct. 455, 30 L.Ed.2d 468,[1] urge that they have been denied due

[1]*See*, e.g., *United States v. Bowdach*, 5th Cir. 1977, 561 F.2d 1160; *United States v. Brand*, 5th Cir. 1977, 556 F.2d 1312; *United States v. Smyth*, 5th Cir. 1977, 556 F.2d 1179; *United States v. Shaw*, 5th Cir. 1977, 555 F.2d 1295; *United States v. Garza*, 5th Cir. 1977, 554 F.2d 257; *United States v. Catano*, 5th Cir. 1977, 553 F.2d 497; *United States v. Netterville*, 5th Cir. 1977, 553 F.2d 903; *United States v. Rice*, 5th Cir. 1977, 550 F.2d 1364, all decided this year. A cursory computer check reveals that at least 33 cases on preindictment delay have been decided in the Fifth Circuit alone since *Marion*.

process because of pre-indictment delay and that this denial of their constitutional rights requires reversal of their convictions and dismissal of the charges against them. Their motions on this ground are without merit because the defendants have not been prejudiced by the delay.

In every instance in which a like motion has been raised in this circuit, it has been denied. However, because of variations in language in the more than thirty post-*Marion* decisions by this court, counsel have been tempted to suggest that the judges of the circuit have not been consistent as to the applicable standards.

In this circuit, as in every other, there can be no doubt that the criteria set forth in *Marion, supra,* as elaborated in *United States v. Lovasco,* 1977, 431 U.S. 738, 97 S.Ct. 2044, 52 L.Ed.2d 752, govern cases of pre-indictment delay, regardless of any slight variations in the words different panels of the court have used to paraphrase or interpret those criteria.

In *Lovasco,* the court said:

> . . . [S]tatutes of limitations, which provide predictable, legislatively enacted limits on prosecutorial delay, provide "the primary guarantee, against bringing overly stale criminal charges," [*Marion*], at 322, 92 S.Ct. at 464, *quoting United States v. Ewell,* 383 U.S. 116, 122, 86 S.Ct. 773, 777, 15 L.Ed.2d 627 (1966). But we did acknowledge [in *Marion*] that the "statute of limitations does not fully define [defendants'] rights with respect to the events occurring prior to indictment," *id.,* 404 U.S. at 324, 92 S.Ct. at 465, and that the Due Process Clause has a limited role to play in protecting against oppressive delay.

431 U.S. at 789, 97 S.Ct. at 2048, 52 L.Ed.2d at 758. The court continued:

> . . . [P]roof of actual prejudice makes a due process claim concrete and ripe for adjudication, [but does not make] the claim automatically valid.

431 U.S. at 789, 97 S.Ct. at 2048, 52 L.Ed.2d at 759.

* * * * * *

Thus *Marion* makes clear that proof of prejudice is generally a necessary but not sufficient element of a due process claim, and that the due process inquiry must consider the reasons for the delay as well as the prejudice to the accused.

431 U.S. at 790, 97 S.Ct. at 2049, 52 L.Ed.2d at 759.

[1] These statements require that a court, in evaluating an asserted due process violation based on pre-indictment delay, consider both the reasons for the delay and the prejudice to the accused. But in identifying a violation, prejudice to the accused is the threshold criterion. As this court recently repeated in *United States v. Brand,* 5th Cir. 1977, 556 F.2d 1312, 1316:

The Supreme Court has held that *Marion* requires a showing of actual prejudice. *United States v. Lovasco*, 431 U.S. 738, 97 S.Ct. 2044, 52 L.Ed.2d 752; *see United States v. McGough*, 5 Cir. 1975, 510 F.2d 598; *United States v. Beckham*, 5 Cir. 1975, 505 F.2d 1316, *cert. denied*, 421 U.S. 950, 95 S.Ct. 1683, 44 L.Ed.2d 104; *United States v. Zane*, 5 Cir. 1973, 489 F.2d 169, *cert. denied*, 1974, 416 U.S. 959, 94 S.Ct. 1975, 40 L.Ed.2d 310.

[2] Though not expressly stated in the prior cases, it is readily inferable from the decisions of this court that the defendants generally bear the burden of establishing actual prejudice. *United States v. Bowdach*, 5th Cir. 1977, 561 F.2d 1160; *United States v. Netterville*, 5th Cir. 1977, 553 F.2d 903; *United States v. Rice*, 5th Cir. 1977, 550 F.2d 1364; *United States v. Butts*, 5th Cir. 1975, 524 F.2d 975; *United States v. McGough*, 5th Cir. 1975, 510 F.2d 598. *But see United States v. Barket*, 8th Cir. 1975, 530 F.2d 181, *cert. denied*, 1976, 429 U.S. 917, 97 S.Ct. 308, 50 L.Ed.2d 282.

[3] We need not probe here for the characteristics of the possible case that might create an exception to this "generally necessary" element.[2] Here the defendants have neither crossed the threshold nor shown that its pretermission is warranted by some violation of the defendants' constitutional right to due process other than mere delay in indictment.

[2]*See United States v. Avalos*, 5th Cir. 1976, 541 F.2d 1100, 1107 & n.9.

[4] The defendant Swan, in the two-defendant case, 77-5321, urges that the charges against him be dismissed under the Interstate Agreement on Detainers, which applies to federal prosecutions, P.L. 91-538, 84 Stat. 1397-1403 (1970). Resolution of the issue depends on whether a writ of habeas corpus ad prosequendam is a detainer within the terms of the Agreement.

Swan was serving a Mississippi state sentence when he was brought by writ to Florida on October 27, 1976. Trial was scheduled for November 8, 1976. On Swan's motion for a continuance, the trial was reset for December 6, 1976. In December 1976, Swan was returned to Mississippi for a federal trial and returned to Florida in January, 1977 in the five-man case. On April 13, 1977, Swan was returned to federal authorities for sentencing, and a new writ issued to bring Swan to trial in the two-man case on May 5, 1977.

If the first writ was a "detainer," then the United States failed to comply with the 120-day rule. The law of this circuit is that a writ is not a "detainer" for IAD purposes, Interstate Agreement on Detainers Act, art. IV(c). *U.S. v. Scallion*, 5th Cir. 1977, 548 F.2d 1168. While this exact issue is now before the Supreme Court in *United States v. Mauro*, 2d Cir. 1976, 544 F.2d 588, *cert. granted*, 1977,_____U.S._____, 98 S.Ct. 53, 54 L.Ed.2d 71, decision of this case should not be delayed pending action by the court. Swan's sentence in this case is consecutive to the sentence in 77-5194. West, the other defendant in this case, will not be affected by the *Mauro* decision. For this reason, Swan's appeal in 77-5194 will be severed, and the decision in that case will abide the result in *Mauro*.

The court has heard oral argument on these issues and on the remaining ones raised by counsel. Having carefully considered the oral argument and the briefs, we conclude that the other contentions raised as bases for the appeal are without merit.

Consequently, each of the judgments appealed from is AFFIRMED, except the appeal of Swan in 77-5194.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

No. 76-343-Cr-CA
21 USC 846
M/S $15,000 — 5 Yrs.

UNITED STATES OF AMERICA

v.

THOMAS SWAN, ROBERT HIGGINS,
PETER NIELSON, SAL BLACK,
MARK CANTINO, DOUGLAS LNU,
and MICHAEL LNU

The Grand Jury charges that:

COUNT I

Commencing at a time unknown to the Grand Jury and continuing until on or about December 1, 1971, in Dade County, Southern District of Florida, Jamaica, and elsewhere, the defendants,

THOMAS SWAN, ROBERT HIGGINS,
PETER NIELSON, SAL BLACK,
MARK CANTINO, DOUGLAS LNU,
and MICHAEL LNU,

did knowingly and wilfully and unlawfully combine, conspire, confederate and agree with each other and

with other persons to commit offenses against the United States, to-wit: to violate Title 21, United States Code, Section 952(a).

It was part of said conspiracy that defendants would knowingly and intentionally import into the United States from Jamaica quantities of marijuana, a Schedule I non-narcotic controlled substance.

The Grand Jury further charges that the defendants, in order to effect and achieve the goals of the conspiracy did at or about the times and places hereinafter referred to commit certain overt acts, among which are the following:

OVERT ACTS

1. On or about October 15, 1971, ROBERT HIGGINS, PETER NIELSON, MICHAEL LNU, DOUGLAS LNU and MARK CANTINO met with THOMAS SWAN at Miami, Southern District of Florida.

2. Between October 15, 1971, and October 30, 1971, THOMAS SWAN met with SAL BLACK, DOUGLAS LNU, MICHAEL LNU and MARK CANTINO in Jamaica.

3. On or about November 1, 1971, THOMAS SWAN traveled by air from Miami, Southern District of Florida, to Montego Bay, Jamaica.

4. On or about November 5, 1971, the motor vessel "ALISAN" departed Miami, Southern District of

Florida, with THOMAS SWAN, ROBERT HIGGINS and PETER NIELSON as passengers.

5. On or about November 10, 1971, THOMAS SWAN met with SAL BLACK at Land Overy Estates, Jamaica.

6. On or about November 15, 1971, the motor vessel "ALISAN" arrived at Miami, Southern District of Florida, with THOMAS SWAN, PETER NIELSON and ROBERT HIGGINS aboard as passengers.

All in violation of Title 21, United States Code, Section 846.

A TRUE BILL

_____
FORMAN

ROBERT W. RUST
UNITED STATES ATTORNEY

By:_____
DONALD L. FERGUSON
Assistant United States Attorney

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 76-343-Cr-CA

UNITED STATES OF AMERICA,
Plaintiff,

vs.

ROBERT HIGGINS, et al.,
Defendants.

MOTION FOR BILL OF PARTICULARS AND INCORPORATED MEMORANDUM OF LAW

COMES NOW the Defendant, ROBERT HIGGINS, by and through his undersigned attorneys, and moves this Honorable Court for a Bill of Particulars to set forth with specificity the following items:

MOTION AND MEMORANDUM

1. State the following:

a) When the alleged conspiracy commenced.

b) Where the alleged conspiracy commenced.

c) The exact manner in which the conspiracy was to have achieved its purpose.

d) The exact agreement, combination and confederation between the Defendants.

e) Which, if any, of the defendants had in their actual or constructive possession any of the marijuana in question.

f) Any other overt acts known to or believed by, the Government to have been done or effected by defendants.

2. State the following:

a) Who are the "other persons" as alleged in the Indictment to have been involved with defendant.

b) Who is DOUGLAS LNU.

c) Who is MICHAEL LNU.

d) Whether the "ALISAN" was under surveillance in 1971 by any federal, state, or local law enforcement or governmental agency and, especially, during the times alleged in the Indictment herein.

e) Whether the dates alleged in the overt acts in the Indictment are the exact dates on which the Government alleges the events in question are to have occurred.

3. State the following:

a) When information was first received by any agent of the federal, state or local government that

resulted in the institution of an investigation of the charges contained in the Indictment.

b) When the investigation of the charges contained in the Indictment were first instituted and what prompted their institution.

c) Whether any indicted defendant or unindicted co-conspirator named or unnamed was acting on behalf of the government in the capacity of an agent or informant or cooperating individual during any part of the alleged conspiracy, or since the termination of same.

d) If the answer to the above is "Yes", state with particularity the inducements, promises or payments made to said person or persons, including but not limited to the formal or informal granting of immunity and/or a promise of a more lenient sentence in exchange for that person or person's cooperation.

4. This Motion is within the language and intent of Rule 7(f), *Federal Rules of Criminal Procedure,* where, as here, it is necessary in order to enable the Defendants to be fully and properly apprised by a "plain, concise and definite written statement of the essential facts constituting the offense charged," Rule 7(c) (1), *Federal Rules of Criminal Procedure;* see also *Russell v. United States,* 369 U.S. 749, 82 S. Ct. 1038 (1962).

WHEREFORE, the undersigned prays the within Motion be granted.

Respectfully submitted,

HIRSCHHORN & FREEMAN, P.A.
Attorney for Movants
742 N.W. 12th Avenue
Miami, Fla. 33136
Tel.: 324-5320

By /s/ Joel Hirschhorn
JOEL HIRSCHHORN

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion for Bill of Particulars and Incorporated Memorandum of Law was mailed this 14th day of September, 1976 to DONALD FERGUSON, ESQ., Assistant U.S. Attorney, 14 N.E. First Avenue, Miami, Florida.

/s/ Joel Hirschhorn
JOEL HIRSCHHORN

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 76-343 CR-CA

[FILED SEP 21, '76]

UNITED STATES OF AMERICA,
Plaintiff,

-vs-

ROBERT HIGGINS, et al.,
Defendants.

ORDER

The defendant ROBERT HIGGINS' various motions have been referred to the undersigned for disposition pursuant to Local Rule 10G. The Court having considered said motions and memorandum of law submitted in support thereof, and being otherwise fully advised in the premises, it is

ORDERED AND ADJUDGED as follows:

1. The Motion for All "Jenck's" Material is denied, without prejudice to the defendant to refile to refile the motion for disclosure pursuant to 18 U.S.C. 3500. See *United States v. Lyles*, 471 F.2d 1167 (5th Cir.,

1972); *United States v. Harris*, 458 F.2d 670, 676 (5th Cir., 1972).

2. The Motion for Bill of Particulars is DENIED, except as otherwise provided in the Standing Discovery Order previously entered herein, and except that the government having charged that the named defendant's conspired with other persons to the grany jury unknown, shall disclose to the defendant the names of such person if their identities are presently known or become known during the course of these proceedings. *United States v. Dioguardi*, 332 F.Supp. 7 (D.C. N.Y. 1971) and excepting Paragraph 3(c)(d) shall be granted.

3. The Motion for Discovery and Production shall be GRANTED.

4. The Motion for Brady, and other favorable material is GRANTED within the confines of the Standing Discovery Order previously entered herein and should include the material requested in Paragraph 4 (a)(b). The remainder of the Motion shall be DENIED.

5. The Motion Requiring Government To Admit or Deny Use of Electronic Surveillance shall be Granted in part. The government shall forthwith say whether any or all of the defendant's have been the subject of any electronic surveillance.

6. The Motion For Leave to File Additional Motions is hereby Denied.

7. Motion to Adopt Co-Defendants' Motions is Granted and the same rulings of the Court shall prevail.

DONE AND ORDERED at Miami, Florida this 21st day of September, 1976.

/s/ PETER R. PALERMO
PETER R. PALERMO,
UNITED STATES MAGISTRATE

cc: Joel Hirschorn, P.A.
742 N.W. 12th Avenue,
Miami, Florida 33136

Donald Ferguson,
Assistant U. S. Attorney
300 Ainsley Building
Miami, Florida

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 77-5194

D. C. Docket No. 76-377-CR-WM

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

ROBERT WEST, KENNY RANDALL,
ROBERT HIGGINS, WILLIAM MILLER
and THOMAS SWAN,
Defendants-Appellants.

Appeals from the Unted States District Court for the Southern District of Florida

Before COLEMAN, HILL and RUBIN, Circuit Judges.

JUDGMENT

This cause came to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgments of the said District Court in this cause be, and the same are hereby, affirmed. *The appeal of Swan will be severed, and the decision in that case will abide the result in Mauro.*

February 21, 1978

ISSUED AS MANDATE:

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 77-5321

D. C. Docket No. 76-343-CR-CA

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

ROBERT HIGGINS and THOMAS SWAN,
Defendants-Appellants.

Appeals from the United States District Court for the Southern District of Florida

Before COLEMAN, HILL and RUBIN, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment

of the said District Court in this cause be, and the same is hereby, affirmed.

February 21, 1978

ISSUED AS MANDATE:

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

OFFICE OF THE CLERK

April 14, 1978

TO ALL PARTIES LISTED BELOW:

NO. 77-5194 — U.S.A. vs. Robert West, Kenney Randall, Robert Higgins, William Miller & Thomas Swan

77-5321 — U.S.A. vs. Robert Higgins & Thomas Swan

Dear Counsel:

This is to advise that an order has this day been entered denying the petition(s) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition(s) for rehearing en banc has also been denied. *

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

*filed on behalf of Messrs. West, Higgins, Miller and Swan

Very truly yours,

EDWARD W. WADSWORTH,
Clerk

By /s/ CLARE F. SACHS
Deputy Clerk

cc Mr. Paul M. Korchin
Mr. Jack J. Taffer
Mr. Joel Hirschhorn
Mr. Fred Haddad
Ms. Karen L. Atkinson
Mr. Charles O. Farrar, Jr.

APPENDIX H.

Constitutional and Statutory Provisions Involved.

1. Constitutional:

AMENDMENT V.

UNITED STATES CONSTITUTION

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. Statutory:

21 U.S.C. §846. Attempt and Conspiracy

Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

21 U.S.C. §963. Attempt and Conspiracy

Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

TIME SEQUENCE CHART

YEAR	CUSTOMS	DEA (BNDD)	DADE COUNTY PUBLIC SAFETY DEPARTMENT	UNITED STATES COAST GUARD	U.S. ATTY.
1971					
November	- Electronic surveillance of the "ALISAN"				
1972					
January	- Aware of Higgins being captain of "ALISAN" - Investigation of "ALLISAN"				
February					
March		- Hoyer, Baston arrested implicate Licktieg, Thurlow, Swan			

YEAR	CUSTOMS	DEA (BNDD)	DADE COUNTY PUBLIC SAFETY DEPARTMENT	UNITED STATES COAST GUARD	U.S. ATTY.
1972					
March		- Inquiry into Swan begun File sent to Miami communication begun			
April	- Subpoenaed telephone tolls of Higgins for February and March				
May					
June	- File closed on "ALISAN" no reports sent to other agencies; information put into Customs Data Process Intelligence File		- Mid June - Publication sent out naming "ALISAN" as suspect boat to Customs, Narcotics, Coast Guard		

YEAR	CUSTOMS	DEA (BNDD)	DADE COUNTY PUBLIC SAFETY DEPARTMENT	UNITED STATES COAST GUARD	U.S. ATTY.
1972					
July					
August					
September			- John Licktieg's house being watched		
October					
November			- Licktieg arrested for possession of marijuana		
1973					
January		- Spoke with Byng Good Pres. of Cigarette Team in reference to Higgins			
February					
March					

YEAR	CUSTOMS	DEA (BNDD)	DADE COUNTY PUBLIC SAFETY DEPARTMENT	UNITED STATES COAST GUARD	U.S. ATTY.
1973					
April					
May		- Interview with Thurlow at Fox Hill Prison named Higgins, fully implicated Swan			- Hoyer convicted of March 1972 arrest - Surrendered in Miami
June					
July		- Report of interview with Thurlow - Baston's arraignment			
August					
September					
October			- Memo from Coast Guard on Miller sent to Lt. Richards of Intelligence	- Sent memo to Dade County Public Safety Department	

YEAR	CUSTOMS	DEA (BNDD)	DADE COUNTY PUBLIC SAFETY DEPARTMENT	UNITED STATES COAST GUARD	U.S. ATTY.
1973					
November					
December					
1974					
January					
February		- Meeting with other agencies and officers on smuggling activities — spoke of Higgins and Miller and West - Undocumented source told them Higgins/Miller had more marijuana	- File on arrest of Higgins and Miller - Investigation		- State's atty. aware of arrest of Hoyer and Baston

YEAR	CUSTOMS	DEA (BNDD)	DADE COUNTY PUBLIC SAFETY DEPARTMENT	UNITED STATES COAST GUARD	U.S. ATTY.
1974					
February		- Cross reference file made up - File closed on Higgins and Miller			
March					
April					
May					
June		- Report sent to IRS on Higgins and Miller			
July		- Interview with Thurlow by another branch office (not Miami) - Swan, Higgins implicated			

YEAR	CUSTOMS	DEA (BNDD)	DADE COUNTY PUBLIC SAFETY DEPARTMENT	UNITED STATES COAST GUARD	U.S. ATTY.
1974					
August	- Sent DEA information on Higgins and Clarence Hill	- Documents from Customs received			
September					
October					
November					
December					
1975					
January					
February					
March					
April					
May					- S/A Harris
June					- meets w/AUSA
July					- Pat Sullivan

YEAR	CUSTOMS	DEA (BNDD)	DADE COUNTY PUBLIC SAFETY DEPARTMENT	UNITED STATES COAST GUARD	U.S. ATTY.
1975					
August					
September					
October		- Made aware of arrest of Higgins and Miller in Bahamas	- Aware of Higgins/Miller arrest in Bahamas - Wrote DEA regarding Higgins		
November		- Conspiracy unit up on Higgins and Miller			
December			- Inquiries on Robert West		
1976					
January		- Dade County — came for assistance			

YEAR	CUSTOMS	DEA (BNDD)	DADE COUNTY PUBLIC SAFETY DEPARTMENT	UNITED STATES COAST GUARD	U.S. ATTY.
1976					
February			- Interviewed Thurlow implicates Linda Walters and Licktieg		
March					
April					
May			- Spoke to Hoyer and Thurlow - Spoke to Howard Walters about his boat "ALISAN" - Spoke with Baston		
June					
July					
August			- Arrest and indictment of Higgins and Miller		